

Cited as "1 ERA Para. 70,511"

Border Gas, Inc. (ERA Docket No. 79-31-NG), May 15, 1980.

Opinion and Order Granting the Authorization Temporarily Approved in
Opinion No. 16, Granting Interventions and Establishing Further Proceedings
for Purposes of Final Consideration of Mexican Pricing Issues

[Opinion and Order]

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I. Background

On March 27, 1980, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 161/ which granted Border Gas, Inc. (@order) temporary authority to import previously approved volumes at \$4.47 per MMBtu, the same price we temporarily approved for Canadian natural gas imports in DOE/ERA Opinion and Order No. 14.2/ This change, effective March 27, 1980, was approved prospectively through May 15, 1980 to coincide with the Canadian temporary price authorization. This action was taken pursuant to an application filed by Border on March 21, 1980, seeking amendment to the authorization granted to Border in Opinion and Order No. 12. The terms of Border's proposed amendment would allow Border to pay Petroleos Mexicanos (Pemex) a price for the natural gas sales to Border equal

to the higher of the price determined either by the application of the approved price escalation formula contained in the Pemex/Border contract of supply, or the Canadian border price for natural gas established by the Canadian National Energy Board and authorized by the U.S. Government.

The Mexican demand for parity with the Canadian border price makes our analysis and conclusions in Opinion and Order No. 14-B,³ which conditionally grants approval of the \$4.47 per MMBtu Canadian price, directly relevant to this docket. In Opinion and Order No. 14-B, we took note of the common interest shared by exporting countries and the United States in uniformity and stability of import pricing. Using a composite alternate fuel oil reference standard based upon tank wagon prices for distillate and residual fuel oil in 10 selected U.S. markets that receive either Canadian or Mexican gas, we found the Canadian price of \$4.47 per MMBtu within the range of prices currently paid for alternate fuels. In addition, we noted that ERA will soon propose a statement of policy that would establish a methodology for establishing a national alternate fuels comparison price for application in future gas import proceedings. In Opinion and Order No. 14-B we also identified policy issues concerning conditions ERA may impose in import authorizations that would discourage overdependence on natural gas imports. These issues will be the subject of further proceedings.

In view of the application of Border to the effect that Mexican gas be treated on a par with Canadian gas, the detailed analysis and discussion in Opinion and Order No. 14-B are equally applicable to this docket. The proposed pricing and the issues requiring further examination are substantially the same. Thus, reference to Opinion and Order No. 14-B will provide further particulars concerning the underlying rationale for this decision and the further proceedings to be held on policy issues pertaining to natural gas imports across the board.

In Opinion and Order No. 16, ERA noted that approval of the interim price increase was granted in view of important foreign policy considerations in establishing equitable prices for natural gas imports from Mexico and Canada, and that it would be consistent with the public interest to ensure continuation of Mexican gas imports. Opinion and Order No. 16 also invited new petitions for intervention, solicited comments from all interested parties on any pertinent issue, and requested that comments specifically address the following matters:

1. Whether the pricing formula amendment described in Border's petition should be approved as a permanent amendment to Opinion and Order No. 12, thereby allowing Pemex to receive the higher of the Contract price or the

Canadian border price. In particular, the following issues should be discussed:

a. Whether the pricing mechanism will result in prices that are both fair and reasonable to U.S. consumers and competitive with prevailing prices for alternate fuels in the U.S. markets in which the gas is sold.

b. Whether the volumes authorized in Opinion and Order No. 12 are needed, nationally or regionally, at the price resulting from the mechanism for which Border seeks approval.

2. Why, if the formula is instituted permanently, it should also be made retroactive to March 1, 1980 as requested by Border.

II. Intervenors

In response to Opinion and Order No. 16, the following parties petitioned to intervene in this proceeding: Northwest Pipeline Corporation, New York State Energy Office, Pacific Gas Transmission Company, Valero Transmission Company, the People of the State of California and the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and United Gas Pipe Line Company.^{4/} The last three mentioned parties have previously requested and been granted intervenor status along with the other parties included in Appendix A of DOE/ERA Opinion and Order No. 12 in this docket.

Based on our finding that the new petitioners have a substantial interest in the outcome of this proceeding and that these interests are not otherwise represented, ERA will grant the intervention requests of Northwest Pipeline Corporation, New York State Energy Office, Pacific Gas Transmission Company, and Valero Transmission Company.

III. Summary of Comments

ERA received comments from one interested party. On April 24, 1980, in accordance with the requirements of Opinion and Order No. 16, Border submitted a statement to the ERA advocating that we extend the new price adjustment beyond May 15, 1980, and make this price retroactive to March 1, 1980.

In its comments, Border states that it believes that the need for Mexican natural gas is compelling, on both a regional and national basis, and that its adjusted import price compares favorably with alternate fuel prices. In substantiating its claim for the need for the gas, Border states that additions to domestic gas reserves have fallen below U.S. production levels

and that for interstate natural gas pipeline companies, the shortage has been aggravated by a decline in the portion of total lower 48 gas production actually delivered to interstate pipelines.

Border believes the \$4.47 price is fair and reasonable, falling well within the range of the prices of competitive fuels in the 34 states served by Border's pipeline purchasers and in 16 of these states priced below the alternate fuels which would be used to offset curtailments of natural gas. In addition, Border believes the gas is fairly priced with respect to supplemental natural gas sources.

With respect to retroactivity for the period March 1, 1980 through March 26, 1980, Border states that approval of the price adjustment for this period is absolutely essential for the continuation of Mexican natural gas imports.

IV. Decision Summary

This Opinion and Order authorizes Border to import natural gas under the pricing mechanism temporarily authorized in Opinion and Order No. 16. This authorization is subject to such additional terms and conditions as may be imposed when the outstanding issues associated with this and the Canadian gas proceeding are resolved and a final decision has been reached. It grants interim approval of prices derived either from the price escalation formula authorized in Opinion and Order No. 12 or, as approved in fact in Opinion and Order No. 16, through parity with the Canadian price. This approval will authorize the higher of either price, subject to such conditions as may be imposed as a result of the further proceedings in this docket. The effective date of this pricing adjustment is the date of the submission of the Border application, March 21, 1980. This Opinion and Order also invites parties in this docket to participate in further proceedings regarding issues of broad interest that require further consideration and hearing.

Our decision to extend the interim authorizations rests primarily on the finding discussed at length in Opinion and Order No. 14-B that the border price of \$4.47 per MMBtu is now consistent with the price of alternate petroleum fuels in the general U.S. market. This finding, coupled with the findings made in Opinion and Order No. 16 that flowing supplies of Mexican natural gas are a needed short-term source of energy, supports the conclusion that continued importation on an interim basis of Mexican gas at the current border price is in the public interest within the meaning of Section 3 of the Natural Gas Act.

V. Mexican Border Price

The Mexican government has insisted upon the concept of price parity between Mexican and Canadian natural gas import prices, and will condition future U.S./Mexico energy relations on approval of this concept.

In issuing Opinion and Order No. 16, ERA noted that it is in the United States' interests to establish a predictable, uniform, and equitable means of establishing stable prices for the importation of gas from Mexico and Canada, and that the public interest would not be served if ERA were to insist upon a continuation of Mexican gas imports only on terms consistent with the October 19, 1979 Contract. Accordingly, for these reasons, ERA approved the \$4.47 per MMBtu border price on the same interim basis as it had been approved for Canadian gas imports.

Border has supplied ERA with its analysis of the pricing of various alternative fuels in the 34 state area served by the Mexican gas. In its analysis, Border presents data on Nos. 2, 4 and 6 fuel oil, propane, and electricity based on their finding that these are the alternative energy sources which would be used to replace curtailed natural gas.

Expressed on a MMBtu basis, Border's findings as to the range of prices is as follows:^{5/}

No. 2 fuel oil:	\$ 5.07 - 6.39
No. 4 fuel oil:	\$ 4.71 - 5.77
No. 6 fuel oil:	\$ 2.17 - 5.61
Propane:	\$ 4.39 - 4.86
Electricity:	\$12.02 - 31.36

While ERA does not dispute Border's enumeration of alternate energy forms generally used as a substitute for gas, we have developed in DOE/ERA Opinion and Order 14-B a national reference standard (representing a composite of alternate fuel oil prices) which can be reasonably applied in this case. That national reference standard is based upon the average price of No. 2 and No. 6 fuel oils in major U.S. oil markets. Based on national industrial and utility fuel use patterns, the average prices are weighted 25 percent towards No. 2 fuel oil and 75 percent towards No. 6 fuel oil and then combined to derive the reference price standard.

This approach parallels a national alternate fuel comparison price

methodology which we will propose for public comment in the near future for application in future gas import proceedings.

In applying the reference standard in Order 14-B, we found that the weighted average price for alternate fuel oils is about \$4.37 per MMBtu. We also found that the border price of \$4.47 is within the competitive range of prices paid for alternate fuels in the U.S. at this time. In view of this price comparability, we find the Mexican border price to be reasonable and consistent with the public interest.

VI. Parity with Canadian Pricing

In its March 21, 1980 filing, Border sought to amend the natural gas sales contract between it and Pemex to allow the latter to receive the higher of the contract price or the Canadian border price. Under no circumstances, however, would Pemex receive a price lower than the Canadian border price for flowing natural gas established by the Canadian National Energy Board and authorized by the appropriate U.S. Government authority.

The intent of this modification is to insure that Pemex receives a price for its gas exports which is comparable to the price of competing gas imported into and sold in U.S. markets. Uniformity in the border prices for Canadian and Mexican pipeline gas is a desirable foreign policy objective provided it results in a price to U.S. consumers which is competitive with alternate fuels.

Under the contract amendment proposed by Border, this foreign policy objective would be achieved. Mexico would be assured a price that is at least equal to the Canadian border price, which in turn would be determined reasonable by ERA only if it did not exceed the national composite price of alternate fuels. Thus, we conclude that the contract amendment proposed by Border is not inconsistent with the public interest.

VII. Effective Date of the Price Increase

In its initial application for a price increase, Border requested that the increase be granted retroactive to March 1, 1980. ERA granted the request effective March 27, 1980, the date of Opinion and Order No. 16, and requested further comment on whether, in its final decision, the rate increase should be made effective retroactive to the date requested by Border. In its comments on ERA's Opinion, Border stated that the increase should be made retroactive to March 1, 1980 because of the need to eliminate any disparity between the price for Mexican volumes and the price paid by U.S. pipelines for Canadian gas. It stated that there was ample legal authority for ERA to institute a rate

increase effective prior to the initial filing date. However, in none of the cases cited by Border, and in no other instance of which we are aware, has a court permitted an agency to institute a retroactive rate increase. Indeed, the courts have repeatedly held retroactive rate increases to be illegal. See *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 644 (D.C. Cir. 1979), cert. den. 100 S. Ct. 520 (1979); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). The corollary of the rule against retroactivity, the "filed rate doctrine," holds that no rate can be made effective prior to the date on which the request therefor was filed, and it is this doctrine that ERA is applying here. We will therefore permit the rate of \$4.47/MMBtu to be made effective March 21, 1980, the date on which Border requested it, and will deny application of the rate during the period March 1, 1980 through March 20, 1980. We are allowing the additional six days, from March 21, 1980 to March 27, 1980, based on our recognition of the need for parity between Mexican and Canadian gas prices and of the importance of good relations with Mexico as a means of maintaining the supply of Mexican gas.

VIII. Notice of Prehearing Conference

The issues raised in Opinion and Order No. 14-B dealing with Canadian imports--namely, the matter of over-dependence on imported natural gas and conditions ERA may impose to reduce unneeded imports, such as a limitation on take-or-pay contracts--apply equally to this docket. Border's contract with Pemex states at clause 8 that Border is obligated to take or pay for a minimum of 75 percent of the daily contract quantity. There is no provision for refund in money or in gas. This clause is substantially similar to those under examination on the Canadian import case. For the reasons stated in Order 14-B with regard to Canadian gas, we are reserving the right to attach additional conditions on the approvals in this Order and will conduct further proceedings to determine what additional conditions if any should be imposed. In particular, we will examine whether the take-or-pay provisions of the agreement between Border and Pemex are in the public interest.

In order to assure all parties a full opportunity to be heard on the remaining issues in this proceeding, ERA will conduct a prehearing conference on June 17, 1980, to determine what relevant issues of fact need to be resolved and the procedures that should be followed to resolve those issues expeditiously. The prehearing conference will be held in Room 2105, 2000 M Street, N.W., Washington, D.C., at 10:00 a.m. The conference will be conducted in accordance with an agenda to be made available at the conference. The conference will be open to the public, but participation in the conference will be limited to applicants and interveners.

Participants in the conference should be prepared to address orally the following issues:

1. What specific factual issues, if any, are in dispute?
2. Is an evidentiary hearing necessary to resolve those factual issues?
3. What procedures should be followed by ERA to resolve any remaining factual issues and determine whether additional terms and conditions should be imposed on the current import authorization?

IX. Order

For the reasons set forth above, ERA hereby orders that:

A. Pursuant to authority under Section 3 of the Natural Gas Act, Ordering Paragraph A of Opinion and Order No. 16 is hereby amended to grant authorization to Border Gas, Inc. to import previously authorized volumes of natural gas from Mexico at \$4.47 per MMBtu, subject to the terms and conditions therein and conditions as shall be prescribed pursuant to Ordering Paragraph B of this Order.

B. Further proceedings shall be conducted in these dockets to determine whether additional terms and conditions should be imposed for the purpose of reducing dependence on natural gas imports from Mexico. Such further proceedings shall include, but not be limited to consideration of conditions that would limit or restrict the operation of take-or-pay type obligations in existing import contracts.

C. A prehearing conference of the applicant and interveners shall be held on June 17, 1980, at 10:00 a.m. in Room 2105, 2000 M Street, N.W., Washington, D.C.

D. The petitions for leave to intervene filed by Northwest Pipeline Corporation, New York State Energy Office, Pacific Gas Transmission Company, and Valero Transmission Company, are hereby granted subject to such rules of practice and procedure as may be in effect, provided that their participation shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions for leave to intervene, that the admission of such intervenors shall not be construed as recognition by ERA that they might be aggrieved because of any order issued by ERA in this proceeding, and that such interveners agree to accept the record as it now stands.

Issued in Washington, D.C. on May 15, 1980.

--Footnotes--

1/ Border Gas, Inc., ERA Docket No. 79-31-NG, March 27, 1980.

2/ Inter-City Minnesota Pipelines, et al., 1 ERA Para. 70,502 (Federal Energy Guidelines) 80-01-NG, et al., February 16, 1980.

3/ Inter-City Minnesota Pipelines, et al., ERA Docket Nos. 80-01-NG, et al., May 15, 1980.

4/ On May 1, 1980, United Gas Pipe Line Company filed a response to Border's statement of April 24, 1980, outlining its views expressed previously, namely, that it supports the initial volumes of gas imports but objects to the exclusivity features of the contract.

5/ Statement of Border Gas, Inc., required by DOE/ERA Opinion and Order No. 16, April 24, 1980, p. 9, and Exhibit 12, where Border presented prices of fuels on April 1, 1980 as published in Platts Oilgram.